UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROVIDENCE HEALTH AND SERVICES - OREGON d/b/a PROVIDENCE PORTLAND MEDICAL CENTER, Employer and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 49, Petitioner	Case No. 19-RC-231425 EMPLOYER'S STATEMENT IN OPPOSITION TO UNION'S CONDITIONAL REQUEST FOR REVIEW

Pursuant to Section 102.67(f) of the National Labor Relations Board's Rules and Regulations, Providence Health & Services – Oregon d/b/a Providence Portland Medical Center (the "Employer" of "PPMC") submits this Statement in Opposition to the Union's Conditional Request for Review ("Union's Request") filed on April 25, 2019.

I. INTRODUCTION AND GROUNDS FOR REVIEW

The Union's Request asks the Board to accept review of the Regional Director's ruling that "Ballot 2"[1] was a vote against Union representation for two reasons. First, the Union claims Ballot 2 should be void because it contains an "identifying mark" on the back and because it is ambiguous. Second, the Union argues the Employer did not properly object to the

[1] Ballot 2 refers to Board Exhibit 3, which was attached to the Union's Request as Exhibit A.

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Board Agent's initial determination that Ballot 2 was void. Both arguments fail for the following reasons.

First, Ballot 2 was properly counted as a "no" vote. The supposed "identifying mark" on the back of the ballot is nothing more than indecipherable scribbles. There is no discernable letter, symbol or name from which the voter's identity could be determined. Under established board law, such scribbles cannot be considered a disqualifying "identifying mark." Moreover, the Union did not claim during the hearing that Ballot 2 was ambiguous and, therefore, that argument was waived. Even if that argument was not waived, however, the ballot unambiguously expresses the voter's intent against union representation. The only marks on the ballot are lines in an around the "no" box. There is no marking whatsoever in the "yes" box. As such, the only reasonable conclusion is that the voter intended to cast a vote against unionization.

Second, the Union's claim that the Employer did not properly preserve its challenge to Ballot 2 was not raised in its exceptions to the Regional Director and, therefore, has been waived. Although the Regional Director noted the absence of an objection in his decision, the Union did not specifically raise that argument in its exceptions and it cannot do so now. In any event, the Union has failed to make any showing that the Regional Director's decision was an abuse of discretion. The Employer's position that Ballot 2 should be counted as a "no" vote was well known to the Union. The Union has not—and cannot—identify any unfair prejudice it has suffered due to the absence of a formal objection related to Ballot 2. And the Union's hyper-technical and formalistic argument should not deprive a voter of his or her right to choose whether to be represented by a Union based on what is, at most, a technical procedural irregularity. In sum, the Union has failed to show that the Regional Director abused his discretion in reaching the merits concerning the validity of Ballot 2.

For those reasons, the Board should deny the Union's request for review.

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II. ARGUMENT

A. Ballot 2 Reflects a Valid Vote Against Union Representation.

1. Ballot 2 Does Not Contain an Identifying Mark.

Both the Hearing Officer and Regional Director correctly concluded that Ballot 2 did not contain an identifying mark. An otherwise unambiguous ballot is void only when it contains markings that "inherently identify the voter" or are "so unusual, or constituted such a significant departure from the usual manner of marking a ballot as to destroy its secrecy and warrant [a] finding that the marking was deliberately done in order to identify the voter." *Luntz Iron & Steel Co*., 97 NLRB 909, 910 (1951) *accord Bridgeton Transit*, 124 NLRB 1047, 1048 (1959).

Here, the scrawls on the back of the ballot are plainly meaningless. The scribbling is incoherent and contains no identifiable symbol, letter or other mark that could "***reasonably*** be expected to identify the voter." *N.L.R.B. v. Duriron Co*., 978 F.2d 254, 257 (6th Cir. 1992) (emphasis in original) (citing *Sioux Products*, *Inc. v. NLRB*, 703 F.2d 1010, 1017 (7th Cir. 1983)). The Union has not, and cannot, show that the incoherent scribbles "inherently identify the voter," nor are the markings "warrant [a] finding that the marking was ***deliberately done in order to identify the voter***." *Luntz Iron & Steel Co*., 97 NLRB 909, 910 (1951) (emphasis added). Thus, there is no basis for finding that the unintelligible markings on the back of the ballot were an attempt to identify the voter.[2]

The Union proclaims that the marks on the back of Ballot 2 "show[] a signature" that is "not legible but was clearly made deliberately." Union's Request at 7:10-13. Simply put, that is a plainly inaccurate description of the mark. Although the Union claims there is a "signature[] followed by additional letters," it does not—and cannot—state what letters of the

[2] Relying on the Board's decision in *Ebco Mfg., Co*., 88 NLRB 983, 985 (1950), the Union claims that the ballot is void so long as the stray mark appeared to have been "deliberate" as opposed to "accidental," regardless of whether it was intended as an identifying mark. But to the extent *Ebco Mfg.* could have ever been read so expansively, it was abrogated by in *Luntz Iron & Steel Co*., 97 NLRB 909, 910 (1951), which held that a ballot could be invalidated only if it was "deliberately done in order to identify the voter." *Luntz Iron & Steel Co*., 97 NLRB 909, 910 (1951).

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alphabet appear on the back of Ballot 2. Indeed, there are no letter—only indiscriminate and indecipherable scribbles. Accordingly, the Union's claim that Ballot 2 contains an identifying mark fails.

2. Ballot 2 Unambiguously Reflects the Voter's Intent to Vote Against Union Representation.

It is settled Board policy that a ballot should be counted where a voter's intent is clear, despite irregularities in the voter's mark. *See Hydro Conduit Corp*., 260 NLRB 1352 (1982) ("[I]n keeping with our longstanding policy of attempting to give effect to voter intent whenever possible, we will hereafter count any unambiguous expression of voter intent as expressed on the ballot."); *Columbus Nursing Home, Inc*., 188 NLRB 825 (1971) ("It is the policy of the Board to count irregularly marked ballots whenever the intent of the voter is clearly apparent."); *see also, e.g., NLRB v. Duriron Co*., 978 F.2d 254, 257 (6th Cir. 1992) ("A ballot should normally be counted if there is a clear expression of preference, regardless of an irregularity in the voter's mark.") (emphasis added); *NLRB v. Connecticut Foundry Co*., 688 F.2d 871, 875 (2d Cir. 1982) ("The general rule is that a ballot should be counted if there is a clear expression of preference, regardless of the irregularity of the mark on the ballot.") (internal quotations omitted; emphasis added)).

Consistent with those principles, the Board routinely overlooks abnormalities in a mark when the voter's preference is nonetheless unambiguous. *See Horton Automatics*, 286 NLRB 1413 (1987) (finding clear evidence of a voter's intent to vote against the union when the voter wrote "non" across a ballot which was in both English and Spanish); *Kaufman's Bakery*, 264 NLRB 225 (1982) (Board disregarded irregular markings made over the original "X"); *Columbia Textile Services*, 293 NLRB 1034, 1034 n.4 (1989); (voter punching a hole through the "yes" box treated as "yes" vote); *Daimler-Chrysler Corp*., 338 NLRB 982 (2003) (treating ballot as "yes" vote where there was "X" in the "yes" box, handwritten "?" adjacent to "yes" square, and no markings in "no" box).

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As an initial matter, the Union's sole argument for voiding Ballot 2 at the election, in its objections, and again at the opening of the hearing concerned the alleged "identifying mark" on the back of the ballot. The Union neither alleged, nor timely argued that the markings *on the front of the ballot* were ambiguous. Thus, its arguments regarding the validity of the voter's expression of his or her preference not to be represented should be disregarded. Regardless, however, the Union's argument fails on the merits. The ballot reveals markings only in and extending outside the "no" box. There are no markings in the "yes" box. Although the ballot did not include a clean "X," that the voter expressed his or her intent in an irregular manner does cause the ballot to be void where, as here, the voter's intent is apparent from the face of the ballot.

The Union attempts to distinguish the Board's ruling in *Kaufman's Bakery*, 264 NLRB 225 (1982), relied upon by the Regional Director, by claiming that it applies only when the ballot displays a "clear 'X'" in one of the boxes with additional stray markings. *See* Union's Request at 5:17-6:21. But that selective quotation misrepresents the much broader holding in *Kaufman*: "we will hereafter regard a mark in only one box, despite some irregularity, as presumptively a clear indication of the intent of the voter." *Kaufman's Bakery, Inc*., 264 NLRB 225 (1982). Indeed, the Board's decision in *Kaufman* expressly embraced the dissent in *San Joaquin Compress & Warehouse Co*., 251 NLRB 23, 24 (1980), in which the dissenting Board member stated the general rule that "[m]arkings in one box only, despite some irregularity, presumptively are a clear indication of the intent of the voter." *Id*. Although the ballot in *Kaufman* did, in fact, display a "clear 'X,'" nothing in the Board's decision suggests that its holding was limited only to ballots that contained exactly the same marks. Rather, *Kaufman* stands for the broader principle that a ballot containing marks in and around one box, with no conflicting marks in the other box, is presumptively sufficient to establish clear voter intent.[3]

[3] The Union places exclusive reliance on *Hanson Cold Storage Co. of Indiana v. Nat'l Labor Relations Bd*., 860 F.3d 911, 917 (7th Cir. 2017), in which the Seventh Circuit Court of Appeals reversed a Regional Director's decision based, in part, on the narrow reading of *Kaufman* that the Union advances here. But that decision is not

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Accordingly, the Regional Director properly concluded that Ballot 2 was a vote against union representation and the Board should deny the Union's Request.

B. The Union's Argument that the Employer Failed to Preserve its Objections to Ballot 2 Is Without Merit.

The Union contends that the Employer did not preserve its right to object to the Board Agent's initial determination invalidating Ballot 2. Not so. First, the Union failed to lodge an exception with the Regional Director concerning whether the Employer properly raised the argument that Ballot 2 should be counted as a "no" vote. The Union's failure to file an exception to that effect precludes it from raising the argument now. Second, even if the Union had preserved the argument (which it did not) the Regional Director reasonably exercised his discretion to reach the merits of whether Ballot 2 was a "no" vote.

1. The Union Waived Its Procedural Argument Concerning Ballot 2.

The Union failed to preserve its procedural argument concerning Ballot 2 in the proceedings below. In its post-hearing brief to the Hearing Officer, the Union argued that the Employer failed to preserve its argument that ***Ballot 1*** was void because it did not file an objection within seven days of the election. Appendix A (Union's Post-Hearing Brief at 5:21-6:7[4]). Although it made a similar argument with respect to Ballot 2, it did so only in a footnote, which is insufficient to preserve the issue. *See United States v. Quinones*, 317 F.3d 86, 90 (2d Cir. 2003) (finding that an argument raised "only in a footnote" is not "adequately raised or preserved for appeal."). Thus, the Union failed to preserve its procedural argument concerning Ballot 2 in its briefing to the Hearing Officer.

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binding on the Board. *See Nielsen Lithographing Co. v. N.L.R.B.*, 854 F.2d 1063, 1067 (7th Cir. 1988), amended, (7th Cir. Oct. 11, 1988) ("[T]he Board . . . is not obliged to accept" the interpretation of circuit courts of appeal); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), *enfd. in part* 331 F.2d 176 (8th Cir. 1964) ("It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise . . . [I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed."). Moreover, as both the Hearing Officer and Regional Director correctly noted, the marks on the disputed ballot in *Hanson* were considerably "more erratic" than those at issue here. *See* Regional Director Decision at 6.

[4] In the Union's brief, "Ballot 1" is referred to as "B-2" while "Ballot 2" is referred to as "B-3."

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Moreover, even if a single footnote in its post-hearing brief was enough to preserve its argument, the Union subsequently waived its procedural argument concerning Ballot 2 when it did not expressly raise the issue in its exceptions to the Regional Director. The Union filed two exceptions from the Hearing Officer's Decision, which included an express timeliness objection with respect to Ballot 1, but did not specifically identify any procedural objection concerning Ballot 2. *See* Appendix B (Union's Exceptions to Hearing Officer's Report on Challenged Ballots and Recommendations). The Union failed to preserve that argument by failing to properly raise it before Regional Director. Therefore, its request for review should be denied.[5]

2. The Regional Director Properly Exercised His Discretion to Reach the Merits of the Parties' Dispute Over the Validity of Ballot 2.

Even if the Union preserved its procedural arguments concerning Ballot 2 (which it did not), the Board should deny the Union's Request because both the Hearing Officer and Regional Director reasonably exercised their discretion to hear both parties' arguments concerning all challenged ballots. Procedural rulings by a Hearing Officer and Regional Director are discretionary and should not be disturbed unless "demonstrably unfair" or upon a showing of prejudice. *See UPS Ground Freight, Inc.*, 365 NLRB No. 113 n.1 (July 27, 2017); *Airway Cleaners, LLC*, 363 NLRB No. 166 n.1 (Apr. 18, 2016) (Regional Director's decision to close the hearing affirmed under abuse of discretion standard).

The Employer properly preserved its challenge to Ballot 2. In its Position Statement submitted on December 20, 2018, the Employer plainly stated its position that Ballot 2 "clearly and unequivocally shows the voter's intent, but had meaningless, random marks on the reverse side of the ballot" and, therefore, should have been counted. Addendum C (Position Statement at 7). And, the Employer consistently maintained its position that Ballot 2 was a valid "No"

[5] Although the exceptions generally reference the Union's post-hearing brief in support of their exceptions, as discussed above, the mere reference to its procedural objection to Ballot 2 in a footnote was insufficient to preserve the issue.

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vote through the hearing and in its post-hearing brief. Thus, the Employer adequately preserved its argument that Ballot 2 should be a "No" vote, and the Union's cynical and belated arguments should be rejected.[6]

As the Regional Director noted, the parties' dispute over Ballot 2 was "raised in hearing" and "[b]oth parties argued their positions on [Ballot 2] to the Hearing Officer and briefed their position on the validity of Ballot 2." Regional Director Decision at 6. Accordingly, the Regional Director correctly concluded there would be "no harm" in addressing the validity of Ballot 2, since both sides had a fair opportunity to litigate the issue.[7] *Id*. Similarly, the Hearing Officer rejected the Union's procedural objections, finding that hearing and considering the parties' arguments would "align form with substance" and would not "prejudice the Union." Hearing Officer Decision at 4. Both rulings were fair and reasonable, and promoted the "right of individual employees to choose whether to be represented by a union," which is the principal goal in representation elections. Regional Director Decision at 4 (citing *General Shoe Corp*., 77 NLRB 124, 127 (1948), enfd. 192 F.2d 504 (6th Cir. 1951)).

The Union has failed to identify any prejudice whatsoever resulting from the Hearing Officer's or Regional Director's decisions. The Union had a full and fair opportunity to address the validity of Ballot 2 both at the hearing, in its post-hearing brief and in its exceptions to the Regional Director. Even if, as the Union incorrectly suggests, the Employer should have identified its position regarding Ballot 2 as an "objection," it has failed to show that any alleged technical irregularity deprived it of an opportunity to be heard on the merits of Ballot 2.

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[6] The Union tacitly acknowledges that its failed procedural arguments with regard to Ballot 1 have no merit. Having abandoned those arguments it is surprising, to say the least, that the Union would resurrect those same arguments with regard to Ballot 2.

[7] The Union contends that the Regional Director's statement that there would be "no harm" was "presumably" a reference "to the fact that counting the ballot did not affect the results of the election." Union's Request at 9. In other words, the Union argues that the Regional Director was announcing his intent to issue an improper advisory opinion. The Union's speculation is incorrect, but also unnecessary. The Regional Director correctly found that neither party would be harmed by reaching the merits because the Union had a full and fair opportunity to litigate the issue.

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Indeed, the Union did not even expressly identify its procedural objection to Ballot 2 in its exceptions to the Regional Director, so it did not genuinely contend that it had been harmed by the Hearing Officer's decision to consider the merits of the parties' arguments on Ballot 2. Absent unfair prejudice, there is no basis to disturb the Regional Director's decision to address the merits of the parties' dispute over the validity of Ballot 2.

III. CONCLUSION

For the foregoing reasons, the Board should deny the Union's Request for Review.

DATED this 2nd day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that at all times mentioned herein I was and now am a resident of the State of Washington, over the age of 18 years old, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is 920 Fifth Avenue, Suite 3300, Seattle, WA 98104.

On May 2, 2019, I caused a true and correct copy of the attached to be served upon the following individual via email:

Kristen Kussmann (kkussmann@qwestoffice.net)

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Executed this 2nd day of May, 2019, at Seattle, Washington.

/s/ Joe Wonderly
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ADDENDUM A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SEIU Local 49, Petitioner/Union, and Providence Portland Medical Center, Employer.	CASE 19-RC-231425 UNION'S POST-HEARING BRIEF

I. Introduction

This matter is before hearing officer Judge Eleanor Laws following a stipulation that resolved the vast majority of challenges and objections in the above-captioned case. As a result of that stipulation, fifteen previously-challenged ballots were opened and counted on January 30, 2019, resulting in a revised tally of ballots, with 383 votes for representation by SEIU Local 49 ("Union") and 382 votes against representation by the Union. B-1(f).[1] The stipulation left for resolution, if necessary, two remaining ballots declared void by the Board Agent at the December 13, 2018, vote count. Given that those ballots became determinative, the hearing officer conducted a hearing on January 31, 2019, regarding those two ballots. One of the ballots (B-2) contains an "X" mark in the "yes" box and an erased mark in the "no" box, demonstrating the clear intent of that voter to vote "yes." Thus, this vote must be counted and added to the number of votes for the Union. The other ballot (B-3) is clearly void as it does not evince the clear intent of the voter (a mark in the "no" box with marks intended to obliterate that mark) and

[1] Herein, Board Exhibits are referred to as "B-[exhibit number]," Petitioner Exhibits are referred to as "P-[exhibit number], and Employer Exhibits are referred to as "E-[exhibit number]."

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it contains an identifying mark (a signature). Therefore, the Union respectfully requests that the hearing officer issue a report and recommendations counting the first ballot (B-2) as a "yes" vote for the Union and voiding the second ballot (B-3).

II. Facts

Pursuant to a stipulated election agreement, on December 12 and 13, 2018, the Board conducted an in-person election for a unit at Providence Portland Medical Center ("Employer"). On December 13, 2018, a tally of ballots issued following the vote count, listing three void ballots and 44 challenged ballots. P-1. That tally indicates challenges were sufficient to affect the results of the election. *Id.* One of the ballots (B-2), with a clear "X" mark in the "yes" box and an erasure in the "no" box, was tallied by the Board agent as a void ballot. *Id*. The envelope used for that ballot contains the label "challenged ballot," and lists the Union/Petitioner's position that the ballot was valid. E-1; RP 14:14-23. Another ballot (B-3) was also tallied by the Board Agent as a void ballot. P-1; B-3. The third ballot, with an "X" in both the "yes" and "no" boxes, was declared void by the Board Agent and the parties stipulated that ballot was void. B-1(f), ¶ 24.

On December 20, 2018, the Union timely filed and served objections to the conduct of the election, which included an objection based upon the failure to count one ballot as a yes vote, and instead listing it as a void ballot on the tally of ballots. B-1(e), ¶ 8, 23; RP 10: 13-17. On January 30, 2019, nearly a month and a half following the due date for objections, the Employer amended its previously-filed objections to add "Objection 12," which objects to any consideration of a ballot (B-2) declared void by the Board agent on December 13. B-1(d). The Union objected to this untimely amendment. RP 12:13.

Also on January 30, as previously noted, the parties entered into a stipulation that resolved all challenged ballots except those declared void by the Board Agent. B-1(e), ¶ 23. The

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stipulation further provided that the parties withdraw objections, except the Union's objection regarding void ballots and the Employer's untimely objection regarding one of the void ballots. *Id.*, ¶ 22, 23.

III. Analysis

A. The Ballot Identified in Board Exhibit 2 ("B-2") Clearly Expresses the Unambiguous Intent of the Voter to Cast a "Yes" Vote and Must Be Counted As Such.

The ballot identified in B-2 must be counted as a yes vote because it contains an "X" in the "yes" box and a smudged diagonal line in the "no" box. The "X" in the "yes" box is clear and does not show any erasure or other irregularity and the voter attempted to erase the irregular mark in the "no" box.

A ballot should be counted "where a voter's intent is clear, despite irregularities in the voter's mark." *TCI West, Inc. v. NLRB*, 145 F.3d 1113, 1115 (9th Cir. 1998), citing *NLRB v. Consolidated Liberty Inc.*, 672 F .2d 788, 791 (9th Cir. 1982) ("The rule of this Circuit is that in representation elections, if the voter's intent is clearly manifested, the ballot is to be counted, even if the voter has not followed the designated procedures"); *see also Hydro Conduit Corp.*, 260 NLRB 1352, 1352 (1982) (Board policy is to "count irregularly marked ballots whenever the intent of the voter is clearly apparent."). The "Board's longstanding policy is to give effect to voter intent whenever possible. Thus the Board will count a ballot where, despite an irregularity in the manner in which it has been marked, it clearly expresses the voter's intent." *Brooks Brothers, Inc.*, 316 N.L.R.B. 176, 176 (1995) (internal citations omitted).

Where a ballot contains a mark in both the "yes" and "no" boxes and one mark is erased, scratched over, or otherwise obliterated, the intent of the voter is clear and the ballot is valid and should be counted. *Mediplex of Conn., Inc.* 319 NLRB 281, 281 (1995) (affirming ALJ finding

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that a ballot with an "X" in both boxes was a valid "no" vote because smudges in the "yes" box indicated attempted erasure); *Brooks Bros., Inc.,* 316 at 176 (1995) (ballot valid where voter scratched over an "X" in the "yes" box and marked an "X" in the "no" box); *Ruen Transport Inc., v. NLRB*, 674 F.3d 672, 676 (7th Cir. 2012) (heavy mark in box for one union and signs of erasure in box for other union showed overall intent to vote for first union); *Abtex Beverage Corp.,* 237 NLRB 1271, 1271 (1978) (ballot with "X" in both boxes with "X" in "no" box scratched over with circular obliteration marks is valid); *Gifford-Hill & Co., Inc.,* 181 NLRB 729, 729 (1970) (ballot valid "no" vote where slanted marking in "yes" box was blurred with pencil, and the "no" box contained a distinct "X" in the "No" box); *Osram Sylvania, Inc.,* 325 NLRB 758, 759 (1998) (ballot valid where smudged diagonal line in "yes" box indicates attempted erasure and the voter's intent to vote "no" is clear based on multiple "X" marks in the area of the "no" box).

Here, the ballot identified in B-2 clearly shows an "X" in the box marked "yes" as well as a diagonal mark in the "no" box covered by smudge marks. The smudge marks in the "no" box obviously show attempts to erase the mark, with smudging caused by each pass of an inadequate eraser, resulting in erasure marks over the darker original diagonal mark, as well as to the right and left of it. B-2. In contrast, the "X" in the "yes" box is free from any smudge marks or any other indication of attempted erasure or obliteration. *Id*. Like the ballots in the above-cited cases, the B-2 ballot clearly indicates the voter's intent and as such, should be counted as a valid "yes" vote.

In *TCI West, Inc*., the Ninth Circuit found that a ballot with an incomplete line in the "yes" box and a dark, "obviously emphasized complete 'X'" in the "no" box was valid because the "the voter clearly intended to cast a 'no' vote." 145 F.3d at 1116. The Court reasoned that

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where a ballot contains marks in both boxes, but one contains a complete "X" and the other an incomplete line, "the two marks are not even susceptible to being interpreted as equal "yes" and "no" votes considering the incompleteness of the line in the "yes" box and the emphasis of the "X" in the "no" box." *Id*. Like the ballot in *TCI West Inc.,* the B-2 ballot contains a complete "X" without any smudging next to an incomplete line in the "no" box. In addition, the line in the "no" box is covered in eraser marks, clearly showing the voter's intent to vote "yes."

Cases where the Board found ballots with markings in both boxes to be void are notably distinguishable. In *Mercy College*, 212 NLRB 925, 926 (1974), the Board found that a ballot that contained a heavily shaded-over discernible "X"' in the "no" square and a standard "X" in the "yes" square left doubt as to the intent of the voter and was therefore invalid. Unlike that ballot, the ballot at issue here does not have "X" marks in both squares, but instead contains a single unmistakable "X" mark in the "yes" box, and an incomplete, smudged, and erased line (not an "X") in the "no" box, clearly showing the voter's intent to cast a "yes" vote. Similarly, in contrast to the ballot in *Bishop Mugavero Center for Geriatric Care Inc*., 322 NLRB 209, 209 (1996), which contained marks in both boxes but no other markings or indications of erasure from which the voter's intent could be ascertained, the line in the "no" box here contains clear erasure marks. These, together with the unmistakable "X" in the "yes" box, clearly demonstrate the voter's intent to vote "yes."

Further, here, the Union properly and clearly stated its position on ballot B-2 at the vote count and timely raised an objection to the Board Agent not counting the ballot as a yes. E-1; B-1(e) ¶ 8; RP 10: 13-17.[2] In contrast, the Employer cannot be allowed to untimely amend its

[2] Objections may be filed over the interpretation or validity of ballots, including void ballots, and in resolving such an objection, the ballot is either counted, or not, if ultimately found void. *F. J. Stokes Corp*., 117 NLRB 951, 954-5 (1957) (where validity of void ballots raised by timely objection, and ballots deemed void by Board Agent are valid, they must be included in official tally of ballots); *Gifford-Hill* 181 NLRB at 729; *see also* NLRB Casehandling

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objection to include an objection to B-2, the ballot that is a clear "yes" vote.[3] The Employer could have timely filed an objection about that ballot (B-2) but did not do so. There is no evidence the Employer did not know about the void ballot – obvious to the Employer at the vote count on December 13, 2018 – at the time it filed its initial objections. And, in any event, the remedy to a challenge or objection regarding a voided ballot is to count it, or declare it void. *See* footnote 2.

Thus, to effectuate the purposes of the Act and to give effect to the clear intent of the voter who cast the ballot identified as B-2, that ballot must be counted as a "yes" vote and must not be considered void.

B. <u>The Ballot Identified In Board Exhibit 3 ("B-3") Was Properly Declared Void Because The Irregular Markings Demonstrate An Intent To Cross Out The No Vote And It Contains An Identifying Signature.</u>

The ballot identified in B-3 is not valid because the irregular markings in and around the "no" box provide no clear indication of the voter's intent as they can reasonably be interpreted as an attempt to void the ballot by obliterating the diagonal mark. This ballot contains two dark parallel diagonal lines extending outside the "no" box, and multiple scribble marks in a somewhat oval shape perpendicular to the diagonal lines, which also go well outside the "no" box. B-3. Additionally, the back of the ballot also contains an illegible signature. *Id*. This ballot was properly declared void because the voter attempted to obliterate the diagonal mark in the "no" box by covering it with scribble marks and the voter's intent cannot be determined from the

Manual, Part 2, Representation Proceedings (Jan. 2017), Sections 11340.7, 11340.8(b)(1), and 11392.1(a). The proper result is not to invalidate the election based on the disposition of an objection of or challenge to a void ballot determination, and the Union does not seek such an outcome here.

[3] Objections must be filed within seven days after a tally of ballots has been prepared. NLRB Rule Section 102.69(a). NLRB Rule Section 102.2(b), which allows certain documents to be filed late upon a showing of good cause, does not mention objections.

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irregular marks on the ballot. And, the signature, whether legible or not, is an identifying mark. Therefore, this ballot was correctly declared void by the Board Agent.[4]

In *Hanson Cold Storage Co., v. NLRB*, 860 F.3d 911 (7th Cir. 2017), the Seventh Circuit held that a ballot with irregular marks in and around the "Yes" box (which are strikingly similar to those on B-3) was void because the "markings… give no clear indication of the voter's intent to vote, and the scribbles are not merely stray marks but easily could (and maybe should under the circumstances) be interpreted as an outright attempt to void the voter's vote." *Id*. at 917. That court found that it was an abuse of discretion for the Board to apply a presumption articulated in *Kaufman's Bakery*, 264 NLRB 225, 225 (1982) to the ballot before the court because "the presumption only applies when the ballot 'reveals a clear 'X' almost entirely contained within' one of the boxes and 'no irregular markings appear outside the marked box.'" *Hanson Cold Storage Co.* 860 F.3d at 917. Specifically, in *Kaufman's Bakery*, the Board held that "when a ballot reveals a clear 'X' *almost entirely contained within either the 'Yes' box or the 'No' box, and no irregular markings appear outside the marked box*" the Board will regard the mark, "despite some irregularity, as presumptively a clear indication of the intent of the voter." *Id*. at 225 (emphasis added).

The *Hanson Cold Storage* court reasoned that the "X" on the ballot at issue could "hardly be described as "clear" given that scribbling covers much of the "X" and "[m]oreover, the 'X' is not 'almost entirely contained within' the 'Yes' box and much of the scribbling… appears outside that box." *Id*. Finally, the court noted that even if the *Kaufman's Bakery* presumption did

[4] The Employer did not file any objection regarding this void ballot, but instead addressed this ballot in its challenges. Any Employer objection to the Board Agent's declaring this ballot void is therefore waived. *See* footnote 3.

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apply, it is overcome because "a ballot that contains an 'X' that may or may not have been scribbled out" provides "absolutely no indication of how the voter intended to vote." *Id*.

Like the void ballot in *Hanson Cold Storage*, the marks in B-3 (which are not even an "X") is not contained within the "No" box, but instead goes well outside of the box in multiple directions and is far from clear. B-3. The irregular markings in B-3 are notably akin to those found on the void ballot in *Hanson Cold Storage*, and similarly can reasonably be interpreted as an attempt to void the ballot. Like that void ballot, the markings on B-3 give no clear indication of the voter's intent and was properly voided. Further, unlike the clear "X" and irregular markings that were within the "yes" box in *Kaufman's Bakery*, B-3 does not have a clear "X" contained squarely within the "no" box, as the two parallel diagonal lines (not an "X") extend far outside of the "no" box as do the irregular scribble markings that attempt to obliterate the diagonal lines. B-3.

The ballot identified in B-3 is also not valid because it contains the voter's signature on the back of the ballot. B-3. Ballots that have been signed or otherwise marked so that the identity of the voter could be revealed are invalid. *Ebco Mfg., Co.,* 88 NLRB 983, 985 (1950). "Distinguishing or identifying markings on ballots will render such ballots void because it is inconsistent with the principle of a secret election." *Id*. at 984. It is not necessary to establish the identity of the voter that cast the marked ballot, instead it is "sufficient that, upon an examination of the ballot, the marking in question appears to have been made deliberately, rather than accidentally or inadvertently, and that it may serve to reveal the identity of the voter." *Id*. at 984-985. In *Ebco Mfg.,* the Board found that a ballot containing a capital letter "R" with a circle drawn around it, was a distinguishing mark that could identify the voter, and therefore the ballot was void. *Id*.

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Here, B-3 shows a signature on the back of the ballot, with two scribble marks above the signature. B-3. The signature is not legible but was clearly made deliberately as indicated by the swooping letter starting at the left side of the signature, followed by additional letters, not unintentional scribbling. The intentional nature of the signature is clear when contrasted with the random scribble marks above the signature, which appear to be the type of scribbles that could result from trying to get a dry pen to write. Like the capital "R" with a circle around it in *Ebco, Mfg*., the signature in B-3 is an identifying mark and the ballot is void.

Thus, the ballot identified in B-3 should remain a void ballot because it does not express the clear intent of the voter and contains an identifying mark.

IV. Conclusion

For the foregoing reasons, the Union respectfully requests that the hearing officer issue a report and recommendations counting ballot B-2 as a "yes" vote for the Union and voiding ballot B-3.

DATED: February 7, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 7th day of February, 2019, a copy of this document was electronically filed via the NLRB E-Filing system and is being served upon the following persons by electronic mail as follows:

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ADDENDUM B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SEIU Local 49, Petitioner/Union, and Providence Portland Medical Center, Employer.	CASE 19-RC-231425 **UNION'S EXCEPTIONS TO THE HEARING OFFICERS REPORT ON CHALLENGED BALLOTS AND RECOMMENDATIONS**

Pursuant to section 102.69(c)(1)(iii) of the Board's Rules and Regulations, Petitioner SEIU Local 49 ("Union") takes the following exceptions to the Decision of the Hearing Officer, Administrative Law Judge Eleanor Laws, in the above-referenced matter on February 21, 2019:

1. For the reasons fully set forth in Petitioner's Post-Hearing Brief (pp. 5-6), the Hearing Officer erred in concluding that the Employer timely objected to the voided ballot referenced in the Hearing Officer's Report on Challenged Ballots and Recommendations as "Ballot 1."

2. For the reasons fully set forth in Petitioner's Post-Hearing Brief (pp. 6-9), the Hearing Officer erred in concluding that the voided ballot referenced in the Hearing Officer's Report on Challenged Ballots and Recommendations as "Ballot 2" should be counted as a "no" vote, against representation by the Union.

DATED: March 7, 2019.

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ADDENDUM C

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December 20, 2018

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Re: *Providence Health & Services – Oregon d/b/a Providence Portland Medical Center*, Case 19-RC-231425

Dear Mr. Steffany:

Davis Wright Tremaine LLP represents Providence Health & Services – Oregon d/b/a Providence Portland Medical Center (the "Employer" or "PPMC"). Thank you for giving PPMC the opportunity to address the bases for challenging certain ballots during the recent election in this case. As discussed more fully below, the challenges are straightforward and supported by documentary evidence. We expect that most, if not all, might be resolved without a hearing. In any case, we look forward to discussing the matter with you at your convenience. [1]

Voters Challenged by the Board Agent

The Board agents conducting the election challenged 16 voters because their names were not on the voter list. The Employer respectfully submits that 15 of those employees were not on the voter list because they are ineligible to vote and, therefore, their ballots should not be counted. One (1) of those names – Pichnimoul Neang – was eligible to vote and, therefore, his ballot should be counted.

Ineligible Based on Hire Date

1. Casey Pfluger
2. Juliza Black
3. Eunice Stokes

[1] The Employer reserves its right to produce additional evidence – either through documents or witness testimony – in support of its position and to rebut arguments or evidence presented by Petitioner.

Employees Pfluger, Black, and Stokes all work in job classifications covered by the description of the voting group. However, each one started working for the Employer after the eligibility cut-off date (November 24, 2018). Pfluger and Black started November 26, 2018; Stokes started working at PPMC on December 3, 2018. The documents that show the respective employees' hire dates are attached as Exhibits 1 – 3.

Ineligible Based on Hours Worked

4. Ashley Tracy
5. Tashi Karstang
6. Blondell Jimmerson

Per diem employees Tracy, Karstang, and Jimmerson were not on the voter list because none of them worked the hours necessary for eligibility, as defined in the stipulated election agreement. More specifically, for the 13-week period of August 15 – November 24, 2018:

- Tracy worked only 4.5 hours total;
- Karstang worked only 11.5 hours total; and
- Jimmerson did not work at all during that timeframe.[2]

Because the average hours worked by each of these per diem employees falls below four (4) hours per week for the 13 weeks preceding the eligibility date, they were properly excluded from the voter list, and their ballots should not be opened and counted. The documents showing the respective employees' hours are attached as Exhibits 4 – 6.

Ineligible Based on Job Classification and/or Employee Status

The Stipulated Election Agreement ("Stip") sets forth the job classifications included in the voting group. The following employees were not included on the voter list because they are not employed in any classification covered by the Stip and their positions are not properly included in a nonprofessional bargaining unit; also, some of those employees (as indicated below) are employed by Providence Health & Services – Oregon, dba Oregon Region Shared Services ("Shared Services") and not the Employer:

7. Ernest Balonzo: Assoc Health Info Site-based, Health Information Management (works off-campus at Providence Office Park)

[2] Jimmerson has not worked any hours at PPMC since 2017.

8. Allison Kennedy: Assoc-Ed Qualified Mental Health, Emergency Svcs Behav. Health (Not a Nonprofessional Unit Employee)
9. Rex Rodriguez: Spec Laboratory Supply (works off-campus at Providence Office Park)
10. Maria Lira: Asst-Admin 2, Quality Mgt and Med Staff Svc (Shared Services)
11. Rita Coss: Technologist Surgical, Maternity Services (Technical Employee)[3]
12. Kayleigh Ramey: Tech-Med History Pharm, Pharmacy (Shared Services)
13. Laurie Jones: Coord-Specialty Scheduling, Cancer Center Specialty (Shared Services)
14. Melissa Hubbard: Tech-Med History Pharm, Pharmacy (Shared Services)
15. Jannell Garnett: Tech-Med History Pharm (employed by Shared Services)

The documents showing the respective employees' job classifications, employer, and work location are attached as Exhibits 7-15.

Eligible, But Inadvertently Not On List

One (1) of the employees whose ballot was challenged by the Board Agent due to his name being not on list, was eligible to vote. He transferred to PPMC as of November 11, 2018, before the eligibility cut-off date.

1. Pichnimoul Neang: Asst-Food Svcs

The documents confirming this employee's job classification, employer, and work location are attached as Exhibit 16.

[3] PPMC employs approximately forty-seven (47) Surgical Techs, 8 of whom work in Maternity. Ms. Coss, who works in the Maternity department, is the only Surgical Tech who voted in the election. Ms. Coss holds a position the Union refers to as a "Maternity Tech," which was a position the Union identified as part of the proposed unit in its Petition. During negotiations for the Stip, PPMC explained that it does not employ anyone in the position of "Maternity Tech". Rather, any such employee would fall under the title of "Surgical Tech" (or "Surg Tech") which is a position that would belong in a Technical Unit. After discussion of this issue between the parties and the Board Agent, the position of "Maternity Tech" was **dropped** from the list of eligible classifications and the position of "Surgical Tech" **was not added**, nor was the position of Surgical Tech added to the list of voters who could vote subject to challenge.

Challenged Pursuant to Stip

(Employees who, by agreement, voted Subject to Challenge)

Because the parties could not agree that employees working in certain job classification share a sufficient community of interest to warrant inclusion in the voting group, they stipulated that employees in those job classifications would vote subject to challenge. The Employer maintains its position that the following employees in the job classifications following their names share a sufficient community of interest with the petitioned-for non-professional employees. Thus, the Employer submits that the following employees must be included in the voting group and, therefore, their ballots must be opened and counted:

1. Carla Gibson: Rep Patient Relations, Out-Patient (OP) Mental Health (PPMC)
2. Melinda Schlitt: Rep Patient Relations, OP Mental Health (PPMC)
3. Amanda Heckmann: Receptionist, Outpatient Transfusion (PPMC)
4. Shelly Church: Coord-Pharm Pyxis, Pharmacy (PPMC)
5. Thomas McClary: Tech – Pharm Inventory/Purchaser, Pharmacy (PPMC)
6. Patricia Barker: Coordinator – Pre-Surg Info, Short Stay Surgical Unit (PPMC)
7. Gary Groce: Coordinator – Office, Diagnostic Imaging Administrative Support (PPMC)
8. Janet Rust: Assistant – Resource (PPMC)

Documents showing theses employees' job classification, duties, responsibilities, and other information related to their community of interest with the petitioned-for non-professional employees are attached as Exhibits 17 – 24. Given that questions regarding community of interest are fact-intensive, the Employer respectfully submits that witness testimony should be elicited in the course of a post-election hearing to supplement any relevant documentary evidence.

Ineligible Based on Non-Employee Status

The final and largest group of employees are those whose ballots were challenged because they are not Providence Portland Medical Center employees, but are instead employed by a separate legal entity, Providence Health & Services – Washington d/b/a Resource Engineering & Hospitality Group ("REH"). Those employees – referred to as "Supply Chain" employees – include:

1. Thomas Bednarz
2. Eddie Byrd
3. Kathy Davis
4. Andrew Ellis
5. John Gredler
6. Benjamin Hayes
7. Cindy Hildenbrand
8. Kristi Horton
9. Jason Jonah
10. Kylie MacArthur
11. Robert McClure
12. Connor Messing
13. Bonnie Moore
14. Colleen Nenow
15. Chi Nguyen
16. Samuel Palomino
17. Roheel Raj
18. Timothy Richards
19. David Thompson
20. Jason Williams

REH employees are properly excluded from the voting group, and must be excluded from any bargaining unit that might be certified in this case. Accordingly, the ballots cast by Supply Chain employees must **not** be opened and counted.[4]

As noted above, REH and the Employer are separate corporate entities. REH is part of Providence Health & Services – Washington; the Employer covered by the Stip is part of a separate corporate entity: Providence Health & Services – Oregon. As required, the Employer and REH have separate tax identification numbers, make separate corporate filings (Form 990s),

[4] Documents related to the employment status for the REH employees are attached as Exhibits 25 – 44.

are domiciled in different states (Oregon and Washington, respectively), and operate pursuant to separate and unique articles of incorporation and by-laws filed with the Secretary of State for Washington for REH and for Oregon for Employer. Documents related to the separate corporate identities for REH and the Employer are attached as Exhibits 45 - 48.

More important, REH is solely responsible for personnel and labor matters, as well as the day-to-day supervision, of its employees working within the Employer's facility. For example, Zac Abel is the on-site REH manager who handles scheduling, assignment, direction, and all other supervisory duties related to REH employees and REH operations at the Employer's facility. Mr. Abel's authority reports up through REH's supervisory structure, which is separate from the Employer's reporting structure. In contrast, the Employer's chief executive reports to the chief executive responsible for health care operations for Providence Health & Services – Oregon. The organization chart for PPMC is attached as Exhibit 49.

The petitioned-for employees receive different paid time off benefits than REH employees. For example, the petitioned-for employees receive PTO/EIT; REH employees have a different PTO/Short Term Disability, and Paid Parental Leave program.

The human resource directors for each organization report to different leadership structures unique to their organizations. Those HR directors are independently responsible for implementing, maintaining, and administering different policies for the employees in their respective organizations.

REH employees' wages are determined by REH. The Employer plays no role in REH wage decisions, and REH employees' wages are not linked to the wages the Employer sets for the petitioned-for employees.

In addition to the separation along corporate, supervisory, and human resources lines, REH employees operate as a functionally distinct group. REH provides materiel to the Employer, but the functions and services are carried out only by REH employees. There is no material interchange between the petitioned-for employees and REH employees working in the Employer's facility.

Given the lack of community of interest shared by the petitioned-for employees and REH employees – particularly in light of the legal, organizational, and functional separation between the Employer and REH – the REH employees are properly excluded from the voting group and the petitioned-for bargaining unit of PPMC non-professional employees. Accordingly, the Employer maintains its challenges to the ballots cast by REH employees, and respectfully requests that the Region sustain those challenges. If necessary, the Employer stands ready to present witnesses to provide sworn testimony in support of the documentary evidence provided with this position statement.

POSITION ON "VOID" BALLOTS

The Board Agent declared three ballots "void." PPMC's position is that one of those ballots – which clearly and unequivocally shows the voter's intent, but had meaningless, random marks on the reverse side of the ballot – should have been counted.

PPMC agrees with the Board Agent's determination that the other two ballots were "void" because the voter's intent was not clear.

Please let us know if you have additional questions regarding our position, or the evidence that supports our position.

Best regards,

Davis Wright Tremaine LLP

Peter G. Finch

cc: Providence Portland Medical Center